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IN THE

Supreme Court of the United States

October Term, 1995

EDWARD T. GORWELL,
Petitioner,
v.
STATE OF MARYLAND,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Fifth Amendment protection against double jeopardy is violated when retrial is permitted after the State causes a mistrial by refusing to consent to a jury of less than twelve under Maryland Rule 4-311(b) without satisfying its constitutional requirement of demonstrating a manifest necessity for causing the mistrial.

PARTIES IN THE PROCEEDINGS BELOW

STATE OF MARYLAND,
Complainant-Appellant,

v.

EDWARD T. GORWELL,
Defendant-Appellee.

Circuit Court of Maryland for Baltimore City,
Case No. 193118001

Court of Appeals of Maryland, No. 21, September Term 1994

None of the parties is a private business entity either publicly traded or privately held.

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IN THE
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EDWARD T. GORWELL,
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v.
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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

OPINIONS BELOW

The Memorandum and Order of the Circuit Court of Maryland for Baltimore City regarding Edward T. Gorwell's Motion to Dismiss for Double Jeopardy, is dated November 19, 1993, and appears in case number 193118001.

The Opinion of the Court of Appeals of Maryland, dated July 19, 1995 and captioned as State of Maryland v. Edward T. Gorwell, appears at 339 Md. 203, 661 A.2d 718 (1995).

JURISDICTIONAL STATEMENT

The final judgment of the Court of Appeals of Maryland, of which review is sought, was entered on July 19, 1995. Retrial has been stayed by order of the Circuit Court of Maryland for Baltimore City dated August 21, 1995 pending final disposition of this case in the Supreme Court of the United States. Review is sought by way of a Writ of Certiorari pursuant to Supreme Court Rule 13 and 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V.:

[AMENDMENT V]

[Rights of Accused in Criminal Proceedings]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend XIV.:

[AMENDMENT XIV]

Section 1.

[Citizenship Rights Not to Be Abridged by States]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall bridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. art. VI.:

ARTICLE VI.

[Supremacy Clause]

This Constitution, and the Laws of the Untied States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the

Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

RULE PROVISIONS

Md. Rule 4-311(b):

Rule 4-311. TRIAL BY JURY

(b) Number of Jurors. - A jury shall consist of 12 persons unless the parties stipulate at any time in writing or on the record that the jury shall consist of any number less than 12.

STATEMENT OF THE CASE

On April 17, 1993, Edward Gorwell, a white Baltimore City Police Officer, was pursuing several fleeing suspected car thieves when he perceived a gun shot being fired upon him and accordingly, returned fire. The single shot fired by Officer Gorwell struck and killed Simmont Donta Thomas, an African American youth who was one of the individuals suspected of car theft.

Officer Gorwell was subsequently indicted for manslaughter and tried before a jury in the Circuit Court for Baltimore City. The trial began on July 27, 1993 and although evidence concluded on August 3, 1993, summation did not begin until the morning of August 5, 1993 due to other commitments of the trial court. On the afternoon of August 5, 1993, the jury began its deliberations. After approximately five and one half hours of deliberation, the jurors were released and ordered to return the following morning to continue.

On Friday August 6, 1993, at approximately 10:10 a.m., the trial court was informed that only 11 jurors had returned to continue deliberations and that Juror No. 2, Malcolm Boykin, had failed to appear. Accordingly, the court issued a body attachment for the juror and instructed the sheriff to attempt to locate the missing juror. At the request of the defense, and without objection by the State, the remaining 11 jurors were

sequestered in the jury room and instructed to refrain from deliberating until all jurors were present.

Later that morning, the court informed the parties that although Juror No. 2's whereabouts remained unknown, it had been learned that he had a drinking problem and therefore, police assistance in locating the juror was requested. The court then inquired as to how the parties wished to proceed in light of the events. Defense counsel expressed a desire to avoid a mistrial but stated that it was concerned with placing Juror No. 2 back on the jury panel in the event he was located. It was the defense's position that the remaining jurors be sequestered and deliberations continue with 11 jurors. The court also expressed a desire to avoid a mistrial at this stage, and noted the large amount of time, money and expense which had gone into the trial. Accordingly, the remaining jurors were sequestered for lunch.

Later, the court resumed and again inquired as to the manner in which to proceed. The State requested that the remaining jurors be sent home for the weekend in order to give the court time to learn the whereabouts of Juror No. 2. The State explained:

> MR. DOORY [THE STATE]: . . . . I want to know why the man is not here. If he is not here for a reason not associated with this case, because of his personal life, proceeding with eleven would be acceptable.
>
> If we were to find out later on that he is not here for a reason associated with this case, or some participant in the case, or something along those lines, then I would think that a mistrial is a more appropriate remedy in this situation. To act now, I just wouldn't feel comfortable with learning information at a later date.

(Ta. at 21)[1]. The defense reiterated its desire to proceed with 11 jurors and the court concurred, but decided to refrain from making the decision until the following Monday morning, as the State had suggested. Upon inquiry, the remaining jurors informed the court that they would refrain from outside influences and therefore, they were released until Monday morning without sequestration.

Later that afternoon, Juror No. 2 contacted the court and stated that three unknown "white guys" had assaulted him while cashing his checks the previous evening. The court stopped its inquiry and instructed Juror No. 2 not to speak of the incident with anyone until he arrived by police escort to court.

Prior to Juror No. 2's arrival in court, the court expressed concern that Juror No. 2's incident would influence the verdict and further stated that it believed Juror No. 2 should not continue on the jury. Both defense counsel and the State agreed that it may be necessary to discharge the juror. The court accordingly, issued a gag order and noted the significant amount of time, money, and effort involved in the trial. Upon further discussion as to the potential mistrial situation, the court stated:

> THE COURT: I don't believe we have one right now, Mr. Doory. I have given serious thought to it. I can assure you we have a situation now where there is nothing inflammatory that has

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[1] For purposes of brevity, Petitioner will reference the transcripts of the Circuit Court of Baltimore City proceeding in State of Maryland v. Gorwell, Case No. 193118001, as follows:

"Ta." refers to the transcript of proceedings from the morning and early afternoon of August 6, 1993.

"Tb." refers to the transcript of proceedings from the afternoon of August 6, 1993.

"Tc." refers to the transcript of proceedings from August 9, 1993.

> reached these jurors' ears, where they were inconvenienced all day, that they have been in a neutral stance. They have not deliberated. They have actually been, I think, quite conscientious thus far, in this Court's view. There is no mistrial thus far, and so I want to prevent that circumstance from occurring and we have a weekend ahead of us.

(Tb. at 11-12). Both the court and counsel decided to refrain from further discussions until hearing Juror No. 2's own account of the incident which led to his failure to appear in court.

Upon Juror No. 2's arrival, the trial court resumed its meeting in chambers with counsel. At this time, the State informed the court that "based on just the allegation that the juror has made, it is going to be impossible for us to accept a jury of less than twelve," and reasoned that "there is just no way for the public to accept the impression about what is happening here." (Tb. at 14). Defense counsel advised the court that it did not share in the State's position. The trial court suggested waiting on such a decision until Juror No. 2 was questioned.

Juror No. 2 was then presented and upon being sworn for questioning, stated that after court the previous day, he had gone home and then proceeded to his work place to pick up his paycheck and then to his mother's for an additional check. He then proceeded to a check cashing store on Eastern Avenue to cash the checks. Upon returning to his car, Juror No. 2 stated that "three guys" hit him over the head and "snatched" his money. Upon further court inquiry as to his disappearance, Juror No. 2 explained "the bottom line is, I know this is important, okay, but when I got knocked to the ground and somebody snatched my wife's money, it wasn't important to me and I didn't want to go home so --". (Tb. at 18). Upon being asked by the court, to slowly restate the events, Juror No. 2 stated in conclusion that the incident could have been his fault because he was counting his money as he was walking to his

car. A description of the assailants revealed that they appeared to be youths and that they had white legs. Further explanation revealed that Juror No. 2 had purchased "a half of pint" after the incident, which he sat and drank in his car from 11:30 p.m. on August 5, 1993 until 2:00 p.m. on August 6, 1993. At the conclusion of questioning Juror No. 2, the trial court asked Juror No. 2 whether anything caused him to believe the three individuals had anything to do with the case at hand. Juror No. 2 responded, " I just wasn't paying attention, you know, coming out of the store. I was counting my money, okay, trying to count my money." (Tb. at 37). The court again asked the juror to reflect upon the incident and then inquired once more whether the juror could think of any facts that linked the attack to the present case. Juror No. 2 responded, "No, I don't know anyone who is even connected with the case." (Tb. at 38).

The court then conferred with counsel in chambers. At that time, the State suggested that Juror No. 2 be placed back on the jury because the State was "not comfortable with going with the jury without him giving his account of what happened to him." (Tb. at 39). The State concluded that "with him [Juror No. 2] off the jury, because he was attacked, or claims to have been attacked by three white youths, there is just no way we would consent [to proceed]." (Id.) The following discussions resulted:

> THE COURT: You could accept him [Juror No. 2] if he said he could put everything out of his mind; is that correct?
>
> MR. DOORY [THE STATE]: Yes.
>
> THE COURT: And you could accept him because, I assume you're saying, because you're persuaded in your own mind that what happened to him had nothing to do with any of the participants of this trial; is that correct?
>
> MR. DOORY [THE STATE]: If he's persuaded by it, I could be persuaded by it, yes.

> THE COURT: That's what he said.
> MR. DOORY [THE STATE]: Uh-huh.
> THE COURT: Yes?
> MR. DOORY [THE STATE]: Yes.
> THE COURT: Then why is it, if he and you are persuaded that his robbery had nothing to do with the case, that you would not be willing to go forward with eleven jurors?
> MR. DOORY [THE STATE]: Because, Your Honor, if, in fact, this jury were to come back with a not guilty verdict, I don't see how it would be acceptable to the public or people of the State that criminal action by some people, who the public could view as interested in this case, would change the balance of the case.
> THE COURT: But if the jury came back with a guilty verdict and he was sitting on the jury, how would it look to the public, to follow your thinking, that the Court allowed someone to go on the jury who claimed he had been attacked by someone?
> MR. DOORY [THE STATE]: I understand those are the two sides of it, . . .

(Tb. at 40-41). Defense counsel stated that it was opposed to reseating Juror No. 2 due to a potential bias and the inability to determine the truthfulness of the story. However, the defense agreed to consent to proceed with 11 jurors. The State continued to oppose proceeding, and the court responded as follows:

> THE COURT: . . . you are putting your office in a position where a juror who says he was robbed, and it has nothing to do with the case, and merely because the alleged robbers are white, you refuse to go forward with eleven jurors, although you had said earlier in the day

that if, in fact, it turned out that whatever happened had nothing to do with the case, that you would be willing to go with eleven jurors, and I say that because, as you yourself or as one of the attorneys said during closing arguments, justice is supposed to be blind.

Everybody here is quite sensitive to the issue of race if that is an issue to go into this case. Merely because three teenagers who happen to rob a black person are white, I don't believe should be sufficient for the State's Attorney to believe that somehow the public can have an inference that that had a connection with white people nebulously involved in the case. I do believe it insults the intelligence, integrity, and concern and justice of the general community. I truly believe that.

(Tb. at 43 - 44). The State responded by suggesting that the incident had tampered with the remaining jury panel. The trial court adamantly disagreed with the State and noted the efforts taken by all parties to preserve the remaining jurors who had no knowledge of any of the events pertaining to Juror No. 2. Further discussions over the racial element of the incident led the court to conclude as follows:

THE COURT: . . . There is nothing in this case and nothing in what he [Juror No. 2] says that even a little bit, if it was even a little bit, a scintilla, I wouldn't be talking this strong, because I want the system to be perceived as working so much, and so far I think you've both went out of your way so that both sides and all factions and all constituents to this case were served. . .

If there was, again, tell your superiors, a scintilla of anything other than the fact that the

> legs of the teenagers were white, I would say let's look into it and we can't go forward. It might have something to do with it, but that's not what has happened. . .

(Tb. at 46).

Discussions then focused on possible sequestration of Juror No. 2, during which the State again suggested reseating Juror No. 2. The court reiterated its concerns and indicated that it could not reseat the juror. The court decided to order Juror No. 2 to return home for the weekend, not discuss the case with anyone, and then report to court the following Monday morning.

Proceedings were resumed on Monday morning, August 9, 1993. In open court, but outside the presence of the jury, the court summarized the events which transpired on Friday, August 6, 1993. Juror No. 2 was then called to testify as to the circumstances leading to his failure to appear in court the previous Friday. Again Juror No. 2 was asked if he believed there to be a connection between the assault on him and Officer Gorwell's trial. Juror No. 2 again replied that there was no connection and that he "was like a fool waving his money[.]" (Tc. at 14). After excusing Juror No. 2, the court addressed whether or not to discharge Juror No. 2 from the jury. Defense counsel opposed reseating Juror No. 2 and the State left the decision to the discretion of the court. The court declared that it did not believe Juror No. 2 to be capable of rendering a fair and impartial verdict and expressed concern that Juror No. 2 might contaminate the remaining jurors. Accordingly, the court discharged Juror No. 2 from the jury.

The court then again explored whether or not to proceed with the remaining 11 jurors. The court noted the following:

> THE COURT: . . . There are eleven jurors remaining. They are a representative group of the community in both their racial component or

their gender component. These individuals have, throughout this trial, listened diligently, have been attentive, and always have been on time.

Moreover, a great deal of time, effort, and money, resources have gone into this trial. Until Friday morning, this Court believes the case went forward with both counsel providing a diligent representation of their respective interests in order to insure the integrity and fairness of the trial process.

This Court does not believe that one errant juror who made a deliberate choice not to come in or call should so disrupt the process that the entire trial should not be permitted to go forward. The Court believes it is important for all concerns, the State and the defendant, that these proceedings conclude, that there be a finality sooner than later, in what has occurred.

Thus, I'm going to ask both counsel to indicate to me whether they wish to go forward with eleven jurors. . .

(Tc. at 22). The Defense agreed to proceed with 11 jurors subject to two voir dire questions being asked. Prior to inquiring of the State as to its answer, the Court stated:

THE COURT:. . . before I hear [the answer of the State], I want to impress upon the State the Court's belief, in view of the fact that the defendant is willing to go forward, subject to that voir dire process, that this trial proceed. Witnesses were brought in from out of town. People came in and testified, and, as I have mentioned, time, effort, and a great deal of resources were spent on this trial.

There are eleven people left. They are black and white. They are male and female. They must come forth with a unanimous verdict. It's not a majority rule verdict in this country. The Court strongly believes and has confidence that the eleven jurors that remain can deliberate, and hopefully, come to a unanimous verdict one way or the other.

Therefore, what I am going to do, I would like to recess for fifteen minutes, and I'd like to give you an opportunity to reflect and to talk with others in your office and come back in fifteen minutes with a response as to whether the State is willing to go forward, because this Court strongly believes if the defendant is willing to go forward, this case should conclude.

(Tc. at 23 - 24). The court recessed and upon resuming the State informed the court as follows:

MR. DOORY [THE STATE]:. . . I must tell the court that, among other things, we are very concerned about the lapse of time here, and the record should reflect that the evidence concluded last Tuesday at three-thirty.

The jury began its deliberations approximately noon time on Thursday, and after four hours, or four and a half hours of actual debate, was stopped Friday, and has spent three days to ponder not the evidence, but to ponder the process and the missing juror. We are concerned that the integrity of the process has been so affected that the perception of justice and the public acceptance of a verdict in this case, which was going to be difficult at best anyway for the general public to accept any verdict here, but given the fact that one of the

> jurors had to be removed, the State is unable to give its consent to proceeding with eleven jurors.

(Tc. at 24 -25).

Defense counsel suggested proceeding to verdict by way of a court trial. However, the trial court declined to become the fact finder because it felt at such a late stage in the proceedings, inferences easily may be drawn that the court's decision was biased by exposure to collateral matters which the court would not have allowed itself exposure to if it had initially been chosen as the trier of fact. The State advised that the matter was within the court's discretion and the State had no right to make such a decision. However, the State added that it had confidence in the court's ability, a confidence it did not have in a jury of less than 12. The court concluded that it should not be the trier of fact because there "is, especially in this case, a need for a perception of justice and for the process to work[,]" and at such a late stage it would be unfair to the interests of all for the court to become trier of fact. (Tc. at 28). In conclusion the court stated:

> THE COURT: This Court is dismayed and perplexed that the State would say it had confidence in the Court, one individual, to render a verdict, but that the State lacks the confidence of eleven people, representative in their racial makeup and in their gender makeup. Eleven people who gave up two weeks of their personal time and who each day came in on time, listened attentively, took notes, asked questions, deliberated in good faith, and who would have to, with whatever verdict, give an unanimous verdict, and I emphasize that, this is not a majority rule situation, but a situation where there would have had to have been a unanimous verdict.

> The Court, as I began to say, is dismayed with the State's conclusion that the integrity of the trial has so been affected that the public wouldn't accept the verdict. This Court has more confidence in the public. The result of that decision, of course, leaves the Court's hands tied. I have now no option.
>
> It was so important to the State, to the family of the victim in this case, to the defendant, to the community, that there would be a finality of these proceedings, that they would conclude, and the Court, as I stated before recess, thought they could conclude in a way that showed the process to work.
>
> We have permitted today, as I said before, one juror, one individual who showed a complete disregard for the significance of his role, to totally disrupt the process and to waste time, money, and effort, but other than expressing as strongly as the Court can, its disappointment with the State's decision not to agree to go forward with these eleven people of the community so that they could render a unanimous verdict, the Court has no choice but to declare a mistrial, which is now declared. It is a waste and it was unnecessary.

(Tc. at 29 - 30). The 11 remaining jurors were called to the courtroom, informed of the mistrial situation, and released. Proceedings were accordingly concluded.

Retrial was scheduled for November 29, 1993. Officer Gorwell filed a motion to dismiss on the grounds of double jeopardy and on November 16, 1993, a hearing was conducted on the matter. After arguments, the court held the matter sub curia, and issued a written memorandum and order on November 19, 1993 which granted Officer Gorwell's motion to

dismiss on the grounds of double jeopardy.

The State noted an appeal of the dismissal in the Court of Special Appeals of Maryland, Case No. 1737, September Term 1993. Prior to review of the appeal, however, the Court of Appeals of Maryland issued a writ of certiorari sua sponte to the Court of Special Appeals of Maryland.

By its decision dated July 19, 1995, the Court of Appeals of Maryland reversed the decision of the Circuit Court for Baltimore City and remanded the case for retrial. The Court of Appeals held that no Constitutional requirement exists which requires either party to explain or justify its insistence upon 12 jurors when invoking Maryland Rule 4-311(b), which requires a jury to consist of 12 persons unless both parties agree to a lesser number. By order of the Circuit Court of Baltimore City dated August 21, 1995, retrial is stayed in this matter pending final disposition in the Supreme Court of the United States.

REASONS FOR GRANTING THE WRIT

THE FIFTH AMENDMENT PROTECTION AGAINST DOUBLE JEOPARDY IS VIOLATED WHEN RETRIAL IS PERMITTED AFTER THE STATE CAUSES A MISTRIAL BY REFUSING TO CONSENT TO A JURY OF LESS THAN TWELVE UNDER MARYLAND RULE 4-311(B) WITHOUT SATISFYING ITS CONSTITUTIONAL REQUIREMENT OF DEMONSTRATING A MANIFEST NECESSITY FOR CAUSING THE MISTRIAL.

The issue of whether Maryland Rule 4-311(b) may be relied upon to grant a mistrial without deference to constitutional constraints imposed on retrial after a mistrial, is significant not only to the petitioner, but also to the future development of the common law as it relates to the interpretation of rules in accordance with the Constitution. Specifically, the decision of the Court of Appeals of Maryland

in State of Maryland v. Gorwell, has created a loophole by which any party can use Maryland Rule 4-311(b), which requires both parties to stipulate to a jury of less than twelve, to force a mistrial without meeting the requisite burden of establishing a manifest necessity for the mistrial. This constitutional burden imposed upon the State when it causes a mistrial is mandated by decisions of this Court. However, the effect of the Court of Appeals' interpretation of Maryland Rule 4-311(b) contradicts both the decisions of this Court and the Constitutional guarantees afforded to defendants. Accordingly, if this decision is permitted to stand, the Court of Appeals has opened the door for Maryland to ignore constitutional restraints in the application of state rules. Accordingly, the Court of Appeals has rendered Maryland Rule 4-311(b) unconstitutional in its interpretation and permitted a violation of the double jeopardy safeguards guaranteed to the petitioner by permitting retrial after a mistrial without requiring the State to demonstrate a manifest necessity for the mistrial.

Furthermore, the overall ramifications of the Court of Appeals' decision are widespread in that this decision permits a literal per se application of any state rule without deference to the constitutional constraints ordinarily imposed when invoking such rules. The per se application of the rule is of particular significance because the constitutional requirements afforded all defendants are being bypassed by a state court in its interpretation of a rule. Unlike federal courts of appeal which pay great deference to the decisions of other federal circuits, state courts act very independently of other state courts. Therefore, the potential for a variety of differing constitutional interpretations of identical state court rules throughout different states is significant. Accordingly, it is essential that a consistent precedent be established among the states which establishes the constitutional framework of such state rule interpretation. The issue presented in this case has been addressed by varying state courts and the decision of the Court of Appeals has created

additional conflicting law among the states. Thus, in light of the uniqueness of this issue at bar, the conflict which has already begun between various state courts will remain unresolved until this Court acts to address the issue.

A. The Court of Appeals rendered Maryland Rule 4-311(b) unconstitutional in holding that no requirement exists which mandates that the State justify its decision to insist upon 12 jurors and cause a mistrial.

The Court of Appeals of Maryland held that Maryland Rule 4-311(b), which requires a jury of 12 persons unless both parties agree otherwise, is "clear, unequivocal, and mandatory" and "means just what it says" in that it "does not require that either party explain or justify a decision to insist upon the number of jurors provided by law". (App. at 11-12). Furthermore, the Court of Appeals refused to even "imply such a requirement." (App. at 12). This holding, however, completely disregards the constitutional mandates issued by this Court when a mistrial results after the State invokes Maryland Rule 4-311(b) by refusing to consent to proceed with less than 12 jurors. Accordingly, the decision of the Court of Appeals renders Maryland Rule 4-311(b) unconstitutional when utilized by any party in this manner.

The basis of the mistrial in this case was, as the Court of Appeals stated, "when the 12th juror was discharged and the State declined to agree to proceed with fewer than the number of jurors guaranteed by the applicable Maryland Rule." (App. at 16). It is, therefore, apparent from both the Court of Appeals' decision and the facts of this case, that the State's refusal to stipulate to less than 12 jurors was the direct and immediate cause of the mistrial, as opposed to the juror's disappearance and subsequent discharge. However, the Court of Appeals' holding which disregards the significance of this

basis for the mistrial and simply sets forth a literal reading of the rule, renders such an application of the rule unconstitutional.

The constitutional requirements which the Court of Appeals has failed to adhere to are deeply embedded in decisions from this Court. It is undisputed that the Fifth Amendment of the Constitution guarantees that a person shall not be placed in jeopardy twice. U.S. Const. amend V. This double jeopardy protection applies to the states by virtue of the Fourteenth Amendment. United States v. Dinitz, 424 U.S. 600, 606 n.8 (1976) (citing Benton v. Maryland 395 U.S. 784 (1969)); See U.S. Const. amend XIV. Furthermore, the declaration of a mistrial implicates a defendant's "'valued right to have his trial completed by a particular tribunal.'" Dinitz, 424 U.S. at 606 (quoting Wade v. Hunter, 336 U.S. 684, 689 (1949)). This constitutional protection and valued right is founded upon the principal that the

> State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Dinitz, 424 U.S. at 606 (quoting Green v. United States, 355 U.S. 184, 187-188 (1957)). Accordingly, the judicial system has long adhered to the policy that if a trial is aborted as a result of certain actions of the court or prosecutor without the defendant's consent, thereby depriving him of his right to a verdict, then the prohibition against double jeopardy would preclude a subsequent trial in the absence of "manifest necessity". Arizona v. Washington, 434 U.S. 497, 503-506 (1978); See In re Mark R., 449 A.2d 393, 396 (Md. 1982); Ward v. State, 427 A.2d 1008, 1013-1014 (Md. 1981).

In Arizona, this Court recognized that the significance of a defendant's constitutional protection against double jeopardy requires the State to bear the burden of demonstrating the requisite "manifest necessity" for a mistrial which results without the consent of a defendant. Arizona, 434 U.S. at 505. As this Court stated:

> . . . in view of the importance of the right [of the accused to have trial completed], and the fact that it is frustrated by any mistrial, the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one. The prosecutor must demonstrate "manifest necessity" for any mistrial declared over the objection of the defendant.
>
> The words "manifest necessity" appropriately characterize the magnitude of the prosecutor's burden.

Arizona, 434 U.S. at 505 (quoted by In re Mark R., 449 A.2d at 397). (Emphasis added).

In addition, this Court has further explained that when a prosecutor seeks a mistrial for tactical reasons or for an opportunity to strengthen weaknesses in its evidence and a mistrial is declared "so as to afford the prosecution a more favorable opportunity to convict...", manifest necessity does not exist and retrial is barred. Arizona, 434 U.S. at 508; Downum v. United States, 372 U.S. 734, 736 (1963). As this Court stated in Arizona:

> . . . [S]trictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused.

Arizona, 434 U.S. at 508 (Emphasis added.)

In contrast to the law as established in Arizona, however, the decision of the Court of Appeals has permitted the State to side-step its constitutional obligations by relying on the literal words of Maryland Rule 4-311(b). Quite simply, the Court of Appeals has permitted the State to force the trial court and defendant into a mistrial without shouldering the requisite burden of establishing a manifest necessity for doing so. Such a holding directly violates the constitutional rights of the petitioner, particularly at such a late stage of the trial.

In support of its decision, the Court of Appeals inappropriately analogizes this case to one in which the defendant has attempted to insist upon the right to waive a jury trial, as was the situation in Singer v. United States, 380 U.S. 24 (1965). (App. at 12). However, in sharp contrast to the analogized scenario of Singer, this case presents a situation in which the State's insistence upon its right to 12 jurors under Maryland Rule 4-311(b) directly results in a mistrial without the consent or request of the defendant. No such mistrial situation was presented in Singer. To the contrary, in a situation such as the one at bar, the resulting mistrial has potential double jeopardy ramifications under the 5th Amendment to the United States Constitution. Therefore, the State has the additional burden of justifying the mistrial which resulted from its decision not to acquiesce to less than 12 jurors in accordance with mandates already embedded in the law by decisions of this Court. Accordingly, the Court of Appeals reliance on Singer is unfounded.

The decision of the Court of Appeals grants the State an unconditional and unconstrained right to refuse a jury of less than 12 members by means of the application of Maryland Rule 4-311(b). However, as this Court has established, the 12 person jury is not a constitutional requirement, but instead a "historical accident, unnecessary to effect the purpose of the jury system and wholly without significance `except to mystics.'" Williams v. Florida, 399 U.S. 78, 86 (1970) (cited by

Maryland v. Kenney, 609 A.2d 337, 339 (Md. 1992)). Thus, the Court of Appeals can not interpret a "historical accident" to be an unconditional right and therefore permit the State to utilize Maryland Rule 4-311(b) in a manner which deprives an accused of his or her double jeopardy protections under the Fifth Amendment. Such a decision directly contradicts the Supremacy Clause of the Constitution. See U.S. Const. art. VI. Under the Supremacy Clause, the Court of Appeals can not be permitted to allow the State to rely solely upon Maryland Rule 4-311(b) to justify its actions and ignore its constitutional burden of demonstrating a "manifest necessity" in order to reprosecute the petitioner. In so holding and therefore allowing the State to hide behind Maryland Rule 4-311(b) without meeting its constitutional requirement of demonstrating a "manifest necessity" for the mistrial, the Court of Appeals has rendered Maryland Rule 4-311(b) unconstitutional.

The mandates of the Supremacy Clause and the constitutional requirements of the Double Jeopardy Clause must be harmonized with the words and implementation of the Maryland Rules, particularly in light of the ever increasing length of trials. Otherwise, Rule 4-311(b) violates both the Double Jeopardy Clause and a defendant's right to complete his trial in a particular tribunal. The Court of Appeals' holding creates a loophole for the State by which it could seek to reprosecute an individual while avoiding its heavy burden of demonstrating a manifest necessity for causing a mistrial.

B. In assuming arguendo that the State was required to demonstrate a manifest necessity for the mistrial, the Court of Appeals erred in concluding that the burden was satisfied.

Without altering its decision to interpret Maryland Rule 4-311(b) as an absolute right to require 12 jurors without an explanation, the Court of Appeals addresses the issue of whether circumstances may exist which require a showing of

manifest necessity by the State in causing a mistrial. Although the Court of Appeals' discussion is merely dicta, its rationale demonstrates its misguidance in applying the law and accordingly, rendering its opinion.

1. The Court of Appeals erred in refusing to find a compelling situation of prosecutorial misconduct which warranted the constitutional double jeopardy protection.

First, the Court of Appeals notes that in Oregon v. Kennedy, 456 U.S. 667, this Court recognized that some compelling circumstances exist in which the government's refusal to stipulate to the waiver of a jury trial is motivated by misconduct such that it denies the defendant a right to an impartial trial. (App. at 13). However, despite this recognition, the Court of Appeals erroneously concludes that if the State were to justify its decision to cause a mistrial in this particular case, the justification would have satisfied the requisite "manifest necessity". To support this opinion, the Court of Appeals concludes that the trial court's finding of facts were clearly erroneous. (App. at 14). In particular, the Court of Appeals finds the State's refusal to accept a jury of less than 12 to be a "bit of a stretch" from being the legal equivalent to prosecutorial misconduct which demonstrates a specific intent to cause a mistrial. (App. at 13). However, the facts of this case clearly demonstrate the error in such a conclusion and emphasize further the unconstitutionality of the decision.

The trial court concluded as a matter of factual finding that prosecutorial manipulation existed and "the State's refusal to go forward with less than a broad-based jury of 12 individuals at the conclusion of a long and expensive trial manifested a deliberate intent on its part to afford itself a more favorable opportunity to convict." (App. at 33). As the facts of this case reflect, the State had initially consented to proceed

with 11 jurors if Juror No. 2's disappearance was determined to be unrelated to reasons having to do with the trial. However, as time passed and the prosecutor had an opportunity to confer with the State's Attorney, the State seized the opportunity for a mistrial. The State declared the possibility of a mistrial prior to learning the exact reasons for Juror No. 2's absence, and again after Juror No. 2 called and informed the court that he had been assaulted by white individuals. In fact, at that time, the State was already prepared to reject the jury panel of 11 and only refrained from doing so at the court's insistence. After Juror No. 2 had been questioned by the trial court, the State reiterated its belief that a mistrial was apparent, despite Juror No. 2's confirmation that the attack was unrelated to this case. Furthermore, the State's enthusiastic efforts to reseat Juror No. 2 are indicative of attempted manipulation of the court. Accordingly, the trial court's factual findings are supported by the record and are therefore, not clearly erroneous.

Furthermore, regardless of the fact that such misconduct is supported by the record, a finding of bad faith conduct by the prosecutor is not always a requirement for barring retrial according to the decisions of this Court. Retrial has been prohibited under the Fifth Amendment even when actual bad faith conduct is absent. See Downum, 372 U.S. at 736 (Retrial barred without specific findings of bad faith by prosecutor because discharge of jury before verdict should be exercised "only in very extraordinary and striking circumstances" and the alternative of continuing with remaining counts existed.); United States v. Jorn, 400 U.S. 470 (1971) (defendant protected from burdens of retrial because "independent of the threat of bad faith conduct by judge or prosecutor, the defendant has a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of a mistrial.") Accordingly, this Court's recognition of the significance of a defendant's valued right to be protected from being placed in jeopardy twice, and his right

to have his trial completed in a particular tribunal, have been completely disregarded by the Court of Appeals.

2. The Court of Appeals erroneously opines that the public's perception of justice warrants manifest necessity for a mistrial.

The Court of Appeals gives unwarranted credence to the State's justification for refusing to accept a jury panel of 11 on the grounds that the public's perception of justice constitutes manifest necessity. (App. at 14-15). In particular, the Court of Appeals finds merit in the State's reliance on the public's perception of justice in what it deemed a high profile and racially sensitive case. (App. at 14). However, the Court of Appeals has erroneously disregarded the trial court's finding of fact that there was no basis for the State's concern with the public's acceptance of the verdict and focused on the racial element of the attack of Juror No. 2. As the trial court noted:

> COURT: If there was, again, tell your superiors, a scintilla of anything other than the fact that the legs of the teenagers were white, I would say let's look into it and we can't go forward. It might have something to do with it, but that's not what has happened.

(Tb. at 46).

What the Court of Appeals has failed to recognize is that the Constitution does not protect "appearances" in a criminal trial, but rather the defendant's valued right to have his trial completed by a particular tribunal and not be subjected to repeated prosecution in contravention of the Constitution of the United States. The Court of Appeals' concern with the public's perception completely disregards the defendant's right to a fair and impartial jury. In effect, the decision of the Court of Appeals has place this valued right of a defendant subordinate to the public's perception and has given undue weight to the

public's interest in pursing a fair trial designed to end in a just judgment. See Illinois v. Somerville, 410 U.S. 458 (1973). The finding of the Court of Appeals completely disregards the Constitutional protections afforded the petitioner, particularly in light of the time expense and effort already expended in this lengthy trial.

Furthermore, the Court of Appeals failed to acknowledge that a verdict from an 11 member jury is both permissible under Maryland Rule 4-311(b) and acceptable according to the common law. The justice system of the United States does not depend upon the acceptance or rejection of verdicts by the public. Justice occurs inside the four corners of a courtroom as a result of a select cross-section of the community deliberating as jurors. Any court decision or verdict is both supported and rejected by different sectors of the community, which is precisely the reason a jury composed of a cross-section of the community is accepted as the appropriate forum for the pursuit of justice. The Court of Appeals has unconstitutionally centered its concerns on the public's acceptance of a verdict, rather than concentrating on the impartiality of the jurors and their ability to render a just verdict. Therefore, permitting the State to manipulate the outcome of the trial under the guise of Maryland Rule 4-311(b) in order to appease a portion of the public hardly constitutes a "manifest necessity" for a mistrial and as a result, the decision is unconstitutional.

3. The Court of Appeals erred in declaring the remaining jury panel of 11 a new tribunal.

The Court of Appeals makes the unfounded assertion that regardless of all other law, the remaining jury of 11 was not the same "tribunal" as the jury of 12 and therefore, the defendant had no valued right to have the verdict rendered by the remaining 11 jurors. (App. at 15). This assertion is

unsupported and an impermissible last effort at avoiding the fact that the petitioner had a constitutional right to proceed to verdict which if deprived from him for whatever reason, could only be done constitutionally upon a showing of manifest necessity.

4. The Court of Appeals erroneously gives credence to the unfounded assertion that the remaining jury panel was tainted simply by the loss of one juror.

The Court of Appeals gave deference to the State's concern that the remaining jurors had the opportunity to speculate and ponder as to the circumstances of the missing juror. (App. at 14). Therefore, the Court justified the State's action of forcing the court into a mistrial by refusing to permit the remaining jurors to proceed to verdict. Such a conclusion is unsubstantiated by the facts of this case. The facts clearly reflect the extensive precautionary measures taken by the trial court to ensure that the impartiality of the jury panel remained intact despite the incident surrounding Juror No. 2's dismissal. Throughout the entire episode involving Juror No. 2's failure to appear in court, the jury was isolated from information of the incident in the sanctuary of the jury room. Although the jurors were not sequestered upon their release from court for the weekend, as defense counsel requested, the jurors remained untouched by the events through their commitment to avoid outside influences. In addition, after the jury was released from court for the weekend and Juror No. 2 was subsequently located, the court issued a gag order to prevent information from reaching the remaining jurors. It was the trial court's own position that an impartial verdict could be rendered by the remaining eleven jurors. For this reason, the trial court urged the State to reconsider its position. When reviewing possible juror bias, there are compelling institutional considerations

which favor giving deference to a trial judge's evaluation of that bias. Arizona, 434 U.S. at 513-514. The Court of Appeals failed to appropriately grant the proper deference to the trial court's determination that the remaining jury panel was not biased in any way from the circumstances surrounding Juror No. 2's dismissal and that it could render a fair verdict had deliberations been permitted to proceed.

C. The Court of Appeals' decision is inconsistent with similar constitutional interpretation of peremptory challenge rules.

The decision of the Court of Appeals is diametrically opposed to similar rule interpretation issues which have already been addressed by this Court. In particular, the use of peremptory challenges to strike jurors for any reason has been constrained by Constitutional requirements. The language of the rules permitting peremptory challenges, like Maryland Rule 4-311(b), does not require parties to explain the reason the challenge is being used. However, this Court has declared that when a peremptory challenge is sought to be used under the applicable rule, the Constitution requires that a party justify that the challenge is not used on the basis of race or gender. See Georgia v. McCollum, 502 U.S. 42 (1992); Batson v. Kentucky, 476 U.S. 79 (1986); Tyler v. Maryland, 623 A.2d 648 (Md. 1993); Maryland v. Gorman, 596 A.2d 629 (Md. 1991); Gilchrist v. Maryland, 627 A.2d 44 (Md. App.), cert. granted, 633 A.2d 102 (Md. 1993).

Similarly, the Court of Appeals can not be permitted to allow a per se application of Maryland Rule 4-311(b) without requiring justification for invoking the rule and causing a mistrial. Contrary to the permissible use of peremptory challenge rules, the Court of Appeals has permitted Maryland Rule 4-311(b) to be utilized without paying deference to Constitutional constraints when a mistrial results from the application of the rule. In the event that a rule, such as

Maryland Rule 4-311(b), is invoked in such a manner as to cause a mistrial, the party invoking the rule must be required to justify its decision to invoke the rule in order to establish that the resulting mistrial is based upon a "manifest necessity" so that retrial is constitutionally permitted. The Court of Appeals has erred in holding otherwise.

D. The holding of the Court of Appeals creates conflicting law among states.

The Court of Appeals concludes its decision by asserting that it has interpreted Maryland Rule 4-311(b) consistently with the decisions of other states. (App. at 16). However, contrary to this assertion, the few state courts which have addressed this particular issue have concluded differently. Although the Court of Appeals aligns its decision with that of the decisions in New Jersey v. Romeo, 203 A.2d 23 (N.J. 1964), cert. denied, 379 U.S. 970; Bishop v. Georgia, 347 S.E.2d 350 (Ga. 1986); and Oregon v. McFerron, 628 P.2d 440 (Or. 1981), a contrary ruling exists in Hutchens v. District Court of Pottawatomie, 423 P.2d 474 (Okla. Crim. App. 1967).

In Hutchens, a juror was discharged after the court learned that the juror was the mother-in-law of a rebuttal witness. Id. As in the instant case, the defendant in Hutchens agreed to proceed with 11 jurors, but the state refused, and a mistrial was declared as a result. Id. Upon appellate review, the Court of Criminal Appeals of Oklahoma found no "cogent or compelling reason" for the state's refusal to stipulate to a jury of 11. Id. at 478. To the contrary, the court found the state's decision to have "the appearance of being an arbitrary or adamant position, not based upon any necessity whatsoever." Id. The Hutchens court recognized that:

> Once the jury has been selected and sworn to try any criminal case, the jury should not be discharged prior to returning a verdict, except for a cogent or compelling reason, or for

> a manifest necessity. In situations such as the one presented by this case, the State unnecessarily places itself in the position of confronting a valid plea of former jeopardy. It is difficult to see how the State could be jeopardized under these circumstances. Insofar as a unanimous verdict is required to sustain a conviction, it would appear that the State's chances of obtaining such unanimous conviction with an eleven-man jury would be enhanced. The converse would likewise be true, where the jury should be increased by one juror. Were the latter situation before us, we would unhesitatingly sustain the State's position.

Id. Therefore, the court barred retrial. Id. Both the facts in the case at bar and the law of Maryland mirror that in Hutchens. However, the decisions of the various state courts in each of these cases is diametrically opposed. Clearly, consistent standards are necessary for proper constitutional interpretation of state rules which address the number of jurors in a criminal case.

This need for consistent standards is of particular significance because these decisions are holdings from state courts as opposed to federal circuit courts. Commonly, federal circuit courts pay great deference to the decisions of other federal circuit courts. In contrast, the holdings of state courts are made much more independently of other state court decisions. Thus, the need for a precedent decision from this Court with regard to the issue presented is essential. As this case demonstrates, all states need the assistance of this Court in determining the parameters of applying state rules in a manner consistent with the Constitution.

CONCLUSION

In holding that Maryland Rule 4-311(b) may be utilized to cause a mistrial without a requirement that manifest necessity for the mistrial be demonstrated, the Court of Appeals of Maryland has authorized an unconstitutional application of Maryland Rule 4-311(b). Such a decision deprives a defendant of his or her constitutional double jeopardy protection when forced into a mistrial by such a use of state rules. Furthermore, such a decision authorizes this unconstitutional application of a state rule by any party. Such a loophole for avoiding the guarantees of the Constitution must be closed by this Court in order to protect the rights of citizens.

Furthermore, a consistent standard is necessary to establish the parameters of state rule interpretation in accordance with the Constitution. In the absence of such standardized parameters, the states will continue to develop inconsistent state law pertaining to the constitutional interpretation of identical state rules. As the law stands, the constitutionality of such a literal interpretation of state rules remains an unresolved conflict among the states. A grant of Certiorari would address such inconsistencies and resolve the issue of the application of constitutional constraints in the interpretation of state rules.

Respectfully submitted

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IN THE COURT OF APPEALS OF MARYLAND

No. 21

September Term, 1994

STATE OF MARYLAND

v.

EDWARD T. GORWELL

Murphy, C.J.
Eldridge
Radowsky
Chasanow
Bell
Raker
McAuliffe, John F.
(Retired, Specially Assigned),
JJ.

Opinion by McAuliffe, J.

Filed: July 19, 1995

During deliberation of the jury in this criminal case, the trial judge dismissed one of the jurors at the insistence of the defendant and then declared a mistrial when the State refused to proceed with eleven jurors. Thereafter, the defendant filed a motion to dismiss, contending that the trial should have continued with eleven jurors notwithstanding the objection of the State; that as a result there was no manifest necessity for the granting of a mistrial; and that double jeopardy principles protected the defendant from retrial. The trial judge granted the defendant's motion. The State appealed, and we granted *certiorari* prior to consideration of the case by the Court of Special Appeals. We now reverse, finding there was a manifest necessity for the declaration of a mistrial.

I.

The defendant, Edward T. Gorwell, is a Baltimore City police officer. Just prior to 1:00 a.m. on 17 April 1993 he was following a stolen Chrysler automobile on Ellicott Driveway near Gwynns Falls Park. The Chrysler abruptly stopped, and four young men ran from it into the park. The defendant left his police vehicle and followed on foot. Shortly after the chase began, the defendant fired one shot from his 9 mm. pistol. That bullet struck and killed fourteen-year-old Simmont Thomas, one of the young men fleeing from the Chrysler.

After an investigation, Officer Gorwell was charged with the common-law offense of manslaughter. The State contended that the defendant had no justifiable reason to fire his weapon at or in the direction of the decedent. The defendant contended he had heard a shot from the area where he saw two men running, and that he acted in the defense of his person when he fired a shot at the person he believed was shooting at him. A police search of the area failed to produce any weapons, or any

bullets or cartridges possibly connected with the incident[1] except the single cartridge ejected from Officer Gorwell's weapon. The officer's shot struck the decedent in the back, just below the right shoulder blade. The decedent's hands were wrapped in plastic bags at the scene, and a subsequent test was negative for the presence of gunpowder residue.

The case received a substantial amount of media attention in Baltimore City, and had racial overtones -- the officer was white and the young victim was African American. In a motion for change of venue the defendant alleged that the city's Mayor and State's Attorney had commented that shootings by police in the city were "excessive in number" and that there was "overwhelming citizen polarization for and against the police."

Trial by jury commenced on 27 July 1993, in the Circuit Court for Baltimore City. Presentation of evidence was concluded on Tuesday, August 3, but, because the trial judge had other trial commitments, instructions and closing arguments were deferred until Thursday, August 5. The case was given to the jury at noon on that day. The jury deliberated for about five and one-half hours before being excused for the day and instructed to return the next morning.

On the morning of Friday, August 6, one juror did not appear at the appointed time. The remaining jurors were instructed not to discuss the case, and a search was undertaken for the missing juror.

About noon, information was received from the sheriff's

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[1]A large calibre bullet was found near the left-front wheel of the Chrysler automobile, but it was "extremely worn and weathered looking" and apparently could not be connected to this incident.

office that deputies had contacted the missing juror's employer. The employer stated that the juror picked up his paycheck at 7:00 p.m. on the preceding evening and informed his employer that he was required to return to court the following day. His employer described the juror as a good employee but one who had a drinking problem on his own time. Additionally, the juror's wife called the court in response to messages that had been left on her answering machine, and informed the trial judge that her husband had come home from the courthouse on Thursday, announced that he was going to pick up his paycheck, and left. The juror's wife said she had not seen or heard form him since that time.

The judge sequestered the jury until 2:00 p.m. on Friday, when she held another conference with the attorneys. At this point, she announced that the juror had not been found and asked the attorneys to consider proceeding with eleven jurors. The State's Attorney asked the court to send the eleven jurors home after appropriate admonitions, but to defer any decision on whether to proceed with eleven jurors until the missing juror could be found, and the reason for his non-appearance ascertained. The prosecutor suggested that if the juror's reason for not being present was entirely personal and not associated with the case, proceeding with eleven jurors would be acceptable. If, however, it appeared that the juror was not present "for a reason associated with this case, or some participant in this case, or something along those lines," than a mistrial would be a more appropriate remedy. Defense counsel, after conferring with the defendant, stated he would agree to proceed with eleven jurors. The eleven jurors were sent home at mid-afternoon on Friday, after being told to avoid any media or other reference to the case.

At 3:30 or 4 o'clock that afternoon the missing juror telephoned the judge. The judge arranged for him to be brought

to the courthouse and, while waiting for his arrival, recounted to the attorneys what the juror had told her: that three "white guys" had assaulted him when he was cashing his paycheck. Shortly thereafter, the prosecutor informed the judge that "based on just the allegation that the juror has made, it is going to be impossible for us to accept a jury of less that twelve." He added, however, that the State's view might change after the parties had heard from the juror. He said:

> If the allegation goes away to the point that it has totally evaporated, possibly we can rethink our position, but as long as the allegation remains even in any way viable, there is just no way for the public to accept the impression about what is happening here.

When the juror arrived, he was sworn and interrogated in the presence of the court, counsel, and the defendant. The juror testified that after he left court on Thursday he went home. From there he went to his place of employment and picked up his paycheck, after which he stopped by his mother's house and obtained an additional check from her. Then he went to a liquor store on Eastern Avenue where he cashed his checks. He said as he was walking out, counting his money, three white teenagers attacked him, knocked him to the ground, and took his money; that he was initially dazed but then rode around in his car collecting his thoughts; that he ultimately went to another liquor store and with a few dollars he had in his clothes bought a half-pint of liquor, which he consumed; that he sat in his car for the rest of the night and part of Friday morning before returning to his home.

After the juror completed his testimony, the parties again conferred with the trial judge. The prosecutor suggested that the juror be questioned by the court as to whether the juror felt he could continue serving as a juror without being affected

by what had happened to him. The prosecutor said that if the juror was convinced he could continue the State would agree that deliberations of the twelve jurors should continue. The trial judge asked the prosecutor why, if the juror was convinced the attack had nothing to do with the case, the State would object to proceeding with only eleven jurors. The prosecutor replied:

> Because, Your Honor, if, in fact, this jury were to come back with a not guilty verdict, I don't see how it would be acceptable to the public or people of the State that criminal action by some people, who the public could view as interested in this case, would change the balance of the case.

Defense counsel objected to the juror being allowed to continue. He said he did not believe the juror's story, and he thought the juror would be biased. He requested that the court excuse the juror and allow the eleven remaining jurors to continue. The trial judge, although stating that "everybody here is quite sensitive to the issue of race if that is an issue to go into this case," strongly disagreed with the position being taken by the prosecutor. The Assistant State's Attorney agreed to again confer with his superiors. The juror was excused until the following Monday morning.

On Monday morning, the juror was again sworn and testified in open court but out of the presence of the other jurors. After the juror again stated his version of the events that caused him to be absent, the court asked the parties to state their positions concerning continued service of the juror. Defense counsel again objected to the juror being allowed to continue. The prosecutor stated he would submit the decision to the discretion of the trial judge. The trial judge determined that the juror had been guilty of serious misconduct and removed him from further service on the jury.

The trial judge, after voicing a strong opinion that deliberations should be allowed to continue with the remaining eleven jurors, again asked the positions of each party. Defense counsel stated that "subject to two *voir dire* questions being asked of the jurors, we are inclined to go ahead with the eleven."[2] The prosecutor refused to consent to continuation of the trial with eleven jurors. He said the State was concerned that so much time had elapsed since the conclusion of the evidence, and he was concerned about the public perception of justice under the circumstances. He said:

> I must tell the court that, among other things, we are very concerned about the lapse of time here, and the record should reflect that the evidence concluded last Tuesday at three-thirty.
>
> The jury began its deliberations approximately noon time on Thursday, and after four hours, or four and a half hours of actual debate, was stopped Friday, and has spent three days to ponder not the evidence, but to ponder the process and the missing juror. We are concerned that the integrity of the process has been so affected that the perception of justice and the public acceptance of a verdict in this case, which was going to be difficult at best anyway for the general public to accept any verdict here, but given the fact that one of the jurors had to be removed, the State is unable to give its consent to proceeding with eleven

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[2]The two questions proposed by defense counsel concerned possible media exposure over the weekend, and whether the jurors would be affected by the failure of one of their number to return.

jurors.

Defense counsel then suggested another option -- that the defendant be permitted to waive his right to trial by jury and that the trial judge decide the case. The prosecutor indicated that this option would be within the discretion of the court, and the following colloquy ensued:

> THE COURT: Is the State telling me that they have no opposition to the court being the trier of fact, but they have an opposition to eleven representative people from the community being the trier of fact?
>
> THE PROSECUTOR: Your Honor, the State has no right to decide whether or not the defendant is tried by the court or the jury. We do have the right to either consent or not consent to a jury of less than twelve. We are taking no position about Your Honor accepting a change of election, primarily because we have no right to take a position, but to answer the court's question very succinctly, we have confidence in the court's ability, in the public's perception of the court's ability to decide the case, a confidence that we do not share with a jury of less than twelve.

The trial judge declined the offer, stating:

> [T]his court believes it should not be the trier of fact and the trier of law. I believe that because I do agree with the State that there is, especially in this case, a need for a perception of justice and for the process to work. . . .

The trial judge, after expressing her dismay and disappointment with the State's decision, declared a mistrial.

Thereafter, the defendant filed a motion to dismiss, contending that retrial was barred by double jeopardy protections. At the hearing of that motion, defense counsel argued that jeopardy had attached at the time trial commenced; that the defendant was entitled to have that trial completed by that tribunal; and that "there was no manifest necessity for the State to not accept eleven jurors." The defense asserted that the State did not act in good faith in withholding its consent to proceed with eleven jurors, and that the motivation of prosecutor was that "the State thought they lost this case and wanted to get a new trial." The prosecutor adamantly denied that allegation and said that the State's decision had been made after consultation with a number of persons, including superiors in the State's Attorney's Office and the victim's family. The prosecutor said there were three principal reasons for the State's decision: 1) concern about the time that had elapsed between the close of the evidence on Tuesday and the proposed resumption of deliberations on the following Monday; 2) concern about impact on the remaining jurors of speculation by them concerning the non-appearance of one of their number; and 3) concern "that in a case which caused such controversy within the community a verdict which sprang from an irregular process would not be perceived as justice."

The trial judge took the motion under advisement and thereafter filed a memorandum opinion and order granting the motion and dismissing the charges. She held that the proper test to be applied was not whether the State acted in bad faith, but "whether there was a reasonable alternative to the declaration of a mistrial." The trial judge found that in this case there was both "prosecutorial manipulation" and a reasonable alternative to a mistrial. The determination of prosecutorial manipulation was based on a finding that "the State's refusal to go forward with less than a broad-based jury of twelve

individuals at the conclusion of a long and expensive trial manifested a deliberate intent on its part to afford itself a more favorable opportunity to convict." Concerning the existence of a reasonable alternative to a mistrial, the Court held a "a jury of less than twelve was a reasonable alternative, and that the State has not met its burden of proving otherwise."

II.

Although at one time in the jurisprudential history of this country it was widely believed that the constitutional right to a jury trial guaranteed by the Sixth and Fourteenth Amendments included the right to insist upon a jury of twelve persons, the Supreme Court has declared that not to be the case. In Williams v. Florida, 399 U.S. 78, 86, 90, 90 S. Ct. 1893, 26 L.Ed.2d 446 (1970), the Court opined that the fixing of the number of jurors at twelve "appears to have been a historical accident," and that this feature of the jury had not been immutably codified into the Constitution.[3] The Court was careful to point out, however, that the States were at liberty to require twelve person juries.

> We do not mean to intimate that legislatures can never have good reasons for concluding that the 12-man jury is preferable to the smaller jury, or that such conclusions -- reflected in the provisions of most States and in our federal system -- are in any sense unwise. Legislatures may well have their own views about the relative value of the larger and smaller juries,

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[3]In a later case, the Court made it clear that, although there was no magic in the number 12, the constitutional right to trial by jury guaranteed the right to have at least six jurors. Ballew v. Georgia, 435 U.S. 223, 244, 98 S.Ct. 1029, 55 L.Ed.2d 234 (1978).

> and may conclude that, wholly apart from the jury's primary function, it is desirable to spread the collective responsibility for the determination of guilt among the larger group. In capital cases, for example, it appears that no State provides for less than 12 jurors -- a fact that suggests implicit recognition of the value of the larger body as a means of legitimating society's decision to impose the death penalty. Our holding does no more than leave these considerations to the Congress and the States, unrestrained by an interpretation of the Sixth Amendment that would forever dictate the precise number that can constitute a jury.

Id. at 103.

Maryland Rule 4-311(b) sets forth the law of this State concerning the size of a jury in a criminal case. That Rule provides:

> A jury shall consist of 12 persons unless the parties stipulate at any time in writing or on the record that the jury shall consist of any number less than 12.

The Rule is clear, unequivocal, and mandatory in fixing the number of jurors in a criminal case. The sole possible exception to a jury of 12 involves a stipulation by "the parties," which quite clearly means the State and the defendant, through their authorized representatives.[4] See State v. Kenney, 327 Md. 354,

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[4]Federal Rule of Criminal Procedure 23(b) is similar to Maryland Rule 4-311(b) in that it permits the parties, with the approval of the court, to stipulate to a jury of less than 12. A 1983 amendment to the federal rule addresses the problem that arose in this case. The federal rule now provides that "Even

361-65, 609 A.2d 337 (1992).

We hold that Rule 3-411(b) means just what it says -- that a jury in a criminal case must consist of 12 persons unless both parties agree to a lesser number. The Rule does not require that either party explain or justify a decision to insist upon the number of jurors provided by law, and we will not imply such a requirement. The position of the State's Attorney when asked to stipulate to a jury of less than 12 is analogous to that of a federal prosecutor who is asked to consent to a defendant's waiver of a jury trial in a federal prosecution, and the Supreme Court has interpreted the applicable Federal Rule of Criminal Procedure to permit the prosecutor to withhold consent without the necessity of stating any reason.

> Because of . . . confidence in the integrity of the federal prosecutor, Rule 23(a) does not require that the Government articulate its reasons for demanding a jury trial at the time it refuses to consent to a defendant's proffered waiver.

Singer v. United States, 380 U.S. 24, 37, 85 S.Ct. 783, 13 L.Ed.2d 630 (1965).

The defendant attempts to distinguish the rational of Singer on the ground that Singer involved only the scope of the right to a jury trial, whereas this case also involves double jeopardy protections. Additionally, he points out, Singer left open the possibility that circumstances might be so compelling in a given case that the prosecutor's insistence on trial by jury might result in a denial to the defendant of an impartial trial. Id.

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absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors." Our Maryland Rule has no counterpart provision.

Borrowing from the rationale of Oregon v. Kennedy, 456 U.S. 667, 102 S.Ct.2083, 72 L.Ed.2d 416 (1982), the defendant argues that when a mistrial is necessitated by bad faith conduct on the part of the prosecutor retrial is prohibited by the Double Jeopardy Clause.

Assuming, without deciding, that the intent or motive of the prosecutor in withholding consent to proceed with a jury of less than 12 may in some circumstances justify the trial judge in concluding that the consent of the State is being judged impermissibly withheld, this is not such a case. In Oregon v. Kennedy, supra, the Court held that where there was improper conduct on the part of a prosecutor and that improper conduct was intended to and did goad the defendant into moving for a mistrial, retrial was prohibited by the Double Jeopardy Clause. Id. at 676. It is a bit of a stretch to suggest that a refusal to consent to proceeding with a jury of less than 12, even when it is apparent that a mistrial will necessarily result, is the legal equivalent of actually engaging in prosecutorial misconduct with the specific intent to cause a mistrial. Even if we assume, however, that the withholding of consent for the sole purpose of obtaining a prosecutorial advantage would be improper, and would justify proceeding with a lesser number of jurors in the absence of the State's consent, there is simply no evidence that this was the case here.

The record demonstrates that the State had presented a case that would support a conviction. There is no suggestion in the record that a necessary witness had failed to appear or had recanted, or that the State had somehow failed to produce evidence needed to support an element of the charged offense. Quite to the contrary, the prosecuting attorney demonstrated his willingness to have the case decided on the record as it stood. He suggested that the jury of 12 be allowed to decide the case, provided the temporarily absent juror did not assert that his

ability to decide the issues fairly had been compromised. Moreover, he interposed no objection to the defendant's suggestion that the trial judge decide the case. The trial Judge's finding in this case that there was "prosecutorial manipulation" because the State's refusal to consent to a jury of less than 12 persons "manifested a deliberate intent on its part to afford itself a more favorable opportunity to convict" is clearly erroneous. There is simply no evidence of record that will support that finding, or upon which inference of that intent on the part of the State reasonably may be based.

Although the prosecution voiced some concern about the length of time that had elapsed between the conclusion of the evidence and the resumption of deliberations, this did not appear to be the State's principal reason for declining to consent to continuation of deliberations with 11 jurors. Rather, the principal reason appeared to involve the public's perception of justice in a high profile and racially sensitive case and, to a lesser extent, the possibility of prejudice from speculation of the 11 jurors concerning the absence of their fellow juror and the long delay.

As noted above, the case was highly publicized in the Baltimore City area, and it involved a white police office on trial for the fatal shooting of an African American youth. The prosecutor manifested a concern that not only should justice be done but that justice should appear to have been done. We understand the State's concern to have been that a substantial segment of the community, including many African Americans, might well conclude that justice had been subverted if a verdict of not guilty were returned after the State consented to the "irregular process" of allowing 11 jurors to decide the case, particularly when the excused juror was an African American and his stated reason for failing to appear was he had been beaten by three "white guys." One might wish that racial

considerations and pro-police or anti-police considerations would play no part in the public perception of justice, but that is not necessarily so. The prosecutor's expressed concern for conducting this trial in a manner that would not only be fair but appear to the public to be fair cannot be dismissed out of hand. Indeed, the trial judge expressed the same concern for the perception of justice when she declined to accept the defendant's offer to have her decide the case.

> [T]his court believes it should not be the trier of fact and the trier of law. I believe that because I do agree with the State that there is, especially in this case, a need for a perception of justice and for the process to work. . . .

The defendant insists that his "valued right to have his trial completed by a particular tribunal," Wade v. Hunter, 336 U.S. 684, 689, 69 S.Ct. 834, 93 L.Ed. 974 (1949), means that the defendant has the right to insist that a trial continue when as many as six jurors have been lost, and that the State is obliged to consent unless it can offer a cogent or compelling reason why a jury consisting of fewer than 12 persons would not be fair. See Hutchens v. District Court of Pottawatomie County, 423 P.2d 474 (Okla. Crim. App. 1967) (State must offer cogent or compelling reason for declining to proceed with 11 jurors); S. Schulhofer, Jeopardy and Mistrials, 125 U.Pa.L.Rev. 449, 527 (prosecution should be required to show a reasonable basis for refusing to stipulate to a jury of 11). We do not agree. A jury of 11, or of 6, is not the "same tribunal" with which the case began. Nor is it the jury of 12 that is guaranteed to the State and the defendant by state law.

Moreover, the Supreme Court has made it clear that the "valued right" of which the defendant speaks "must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." Wade v. Hunter, supra, 336

U.S. at 689. The loss of a juror due to illness or other proper cause "justifies a discharge of the jury and declaring a mistrial." Reemsnyder v. State, 46 Md. App. 249, 416 A.2d 767, cert. denied, 288 Md. 741 (1980). The defendant does not suggest that the trial judge erred in dismissing the 12th juror -- indeed the defendant specifically requested that action. The manifest necessity occurred when the 12th juror was discharged and the State declined to agree to proceed with fewer than the number of jurors guaranteed by the applicable Maryland Rule.

The interpretation we accord Maryland Rule 4-311(b) is similar to that given by the New Jersey Supreme Court to an analogous rule of that State:

> There is clearly no intent that either the State or the court must give some valid reason for withholding approval. It is a rule of permissive expediency rather than of compulsory principle.

State v. Romeo, 203 A.2d 23, 29 (N.J. 1964), cert. denied, 379 U.S. 970. See also Bishop v. State, 347 S.E.2d 350, 352 (Ga. App. 1986) (where jury is deprived of the statutory minimum number by the proper removal of a juror, there is manifest necessity for a mistrial); State v. McFerron, 628 P.2d 440, 443 (Or. App. 1981) (State may not be required to proceed with less than 12 jurors).

There is no requirement that the trial judge agree with the State's decision to decline to continue with 11 jurors or, where reasons are given by the State, that the trial judge agree with those reasons. Assuming, without deciding, a contrary result may be dictated where circumstances demonstrate that the State's action was intentionally oppressive or otherwise impermissible, this is not such a case.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED; CASE REMANDED TO THAT COURT FOR

TRIAL; COSTS TO BE PAID BY APPELLEE.

STATE OF MARYLAND	*	IN THE
v.	*	CIRCUIT COURT
EDWARD T. GORWELL, II	*	FOR
	*	BALTIMORE CITY
	*	Case No. 193118001 (Date of Entry: 11/19/93)

* * * * *

MEMORANDUM OPINION AND ORDER

Heller, J.

Defendant, Edward T. Gorwell, II, has moved to dismiss this case under principles of double jeopardy. The State filed a response, and a hearing was held on November 16, 1993.

BACKGROUND

While pursuing individuals in Leakin Park who were suspected of car theft and who had fled a vehicle in the early evening of April 17, 1993, Defendant, a white Baltimore City police officer, fired a shot from his gun which tragically killed Simmont Donta Thomas, a 14-year old African-American youth, one of the fleeing individuals. As a result of this incident, Officer Gorwell has been suspended without pay from the Baltimore City Police Department.

Defendant was tried for involuntary manslaughter before a jury from July 27 to August 3, 1993. Instructions and closing arguments by counsel were presented on the morning of August 5, 1993. The jury then deliberated for approximately five and one-half hours until it was dismissed at the end of the day on

August 5. On the next day, a Friday, only 11 jurors returned to deliberate. An African-American male juror, Juror No. 2, did not appear and jury deliberations, at the request of both the State and Defendant, were suspended. The jury was sequestered. In the meantime, the Court staff attempted to locate the juror. Telephone messages were left on an answering machine at his home but with no response. The jury was provided lunch and remained sequestered in the Court's conference room until more information could be gathered.

This Court then directed the Sheriff's Office to go to the juror's home, where the sheriffs found his wife. She stated that she did not know where her husband was and had not seen him since the previous evening when he had returned home around dinnertime. At that time, he appeared to be preoccupied, and he mentioned to her that he was going to pick up his paycheck. He was home only a short period of time before he left. Tr., Aug. 6, p. 6. Subsequent conversations with the foreman at the juror's place of employment indicated he had indeed stopped for his paycheck at approximately 7 o'clock p.m. and told his supervisor he would be deliberating another day and thus would not be at work on Friday, although he planned to work overtime on Saturday. With that information at hand, after consultation with counsel and the Defendant, the Court requested the assistance of the police in looking for the juror. There was some concern for his safety. See Tr., Aug. 6, at 7-8; Tr., Aug. 9 at 3-6.

When Court reconvened on Friday afternoon, there was no additional information to explain the juror's disappearance. The jury was still sequestered, however, although not deliberating. The police reported that the juror's mother and sister had been interviewed, but there was no trace of the juror or his car. A police bulletin was issued with a description of the juror and his car.

By this time, it was mid-afternoon and the Court suggested the jury continue its deliberations with 11 members. Tr., Aug. 6, at 20. The State recommended that the jury be sent home and brought back on Monday morning so that more information could be obtained concerning Juror No. 2's failure to return. The State's Attorney stated that by Monday, "If he is not here for a reason not associated with this case, because of his personal life, proceeding with eleven would be acceptable." Id. at 21. The Court concurred with the State, and as no further information had been obtained, the trial was recessed. The jury was not sequestered for the weekend but in order to protect the integrity of the trial, the jurors were instructed to refrain from any contact with media accounts of the trial and not to discuss the trial with anyone. Id. The jurors, by way of written communication with this Court, indicated they would abide by these restrictions.

After the jury was sent home on Friday afternoon, the missing juror telephoned this Court's chambers between 3:30 p.m. and 4:00 p.m. He stated he had been assaulted by a group of teenagers but that he was unharmed. He believed at least one of them was white. The Court then directed the police to pick up the juror and bring his to the Courthouse. Even before the juror was questioned about his story, the State, based on his allegations of the assault, stated, "Your Honor, we have conferred and based on just the allegation that the juror made, it is going to be impossible for us to accept a jury of less than twelve." Tr., Aug.6, at 13.

An in camera on the record proceeding was held with the juror, counsel, and Defendant to hear the juror's explanation for his failure to appear. After hearing the story, the prosecutor observed that although he might "go along" with Juror No. 2 remaining on the jury, he would never agree to a jury without Juror No. 2. "But with him off the jury, because he was

attacked, or claims to have been attacked by three white youths, there is just no way we would consent." Id. at 39. The State's reason on Friday afternoon was as follows:

> Mr. Doory: Because, Your Honor, if, in fact, this jury were to come back with a not guilty verdict, I don't see how it would be acceptable to the public or people of the State that criminal action by some people, who the public could view as interested in this case, would change the balance of the case.

Id. at 41.

Defense counsel made clear he was not going to agree to the juror being placed back on the jury. At the same time, he indicated the defense believed deliberations could continue with the 11 jurors. Id. The Court observed "that whatever happened to him, whether it was a drunken stupor, he gave his money to a friend, or somebody robbed him and took it, it had nothing to do with this case." Id. The Court stated to the prosecutor that Friday afternoon:

> . . . you are putting your office in a position where a juror who says he was robbed, and it has nothing to do with the case, and merely because the alleged robbers are white, you refuse to go forward with eleven jurors, although you had said earlier in the day that, if, in fact, it turned out that whatever happened had nothing to do with the case, that you would be willing to go with eleven jurors....

Id. at 43.

After more discussion, the juror was excused, and the Court requested that he return on Monday. See Tr., Aug. 6, at 16-38.

On Monday, the juror repeated his story in open court, out of the presence of the jury. See Tr., Aug. 9, at 9-16. After

considering the juror's story, Defendant's counsel continued to express problems with permitting the juror to resume deliberations. Questions were raised as to the veracity of the story and the inability to verify it. The Defendant objected to his continuing on the jury, but the State took no position. Id. at 16-17. This Court concluded that the juror's actions reflected "a serious breach of responsibility and definite misconduct as a juror." Id. at 18. He had been part of the jury for almost two weeks and well aware of the responsibilities cast upon him and the significance of the case. The Court said at the time:

> Juror No. 2 had to have been aware how, therefore, if he did not appear on Friday morning as ordered by the Court, deliberations were going to be severely disrupted, and, perhaps, a mistrial be required. And after listening to him, this Court concludes that he made a knowing and deliberate decision not to come into Court or call the Court or the police, or his wife or his mother or his sister, and rather, spent a great deal of Thursday evening and Friday in his car in a parking lot and, apparently, drinking a fifth of Jack Daniels and thinking.
>
> These actions are not actions of someone this Court believes who appreciates the responsibility of a juror. These actions do not reflect, in this Court's view, an individual capable of rendering a fair and impartial verdict. There is concern, also, if he were to be permitted to rejoin the jury of the potential contamination of what has occurred on the remainder of the jurors.

Id. at 19-20. In addition, the Court observed that the juror had never apologized or seemed in any way to acknowledge that his behavior had seriously disrupted the trial process. Id. at 21. The juror was excused and subsequently found in contempt of court.

However, merely excusing the juror (with no objection by the State), did not necessitate a mistrial. To the contrary, this Court called attention to Maryland Rule 4-311(b) which would have permitted the parties to stipulate that the jury should consist of less than 12.[5] The Court said at that time:

> The ultimate issue that remains in the case is whether the Defendant can obtain a fair and impartial verdict. There are eleven jurors remaining. They are a representative group of the community in both their racial component [and] their gender component. These individuals have, throughout this trial, listened diligently, have been attentive, and have always been on time.
>
> Moreover, a great deal of time, effort, and money, resources, have gone into this trial. Until Friday morning, this court believes the case went forward with both counsel providing a diligent representation of the respective interests in order to ensure the integrity and fairness of the trial process.
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> This Court does not believe that one errant juror who made a deliberate choice not to

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[5]Md. Rule 4-311 (b) reads in pertinent part, "A jury shall consist of 12 persons unless the parties stipulate at any time in writing or on the record that the jury shall consist of any number less than 12."

> come in or call should so disrupt the process that the entire trial should not be permitted to go forward. This Court believes it is important for all concerned, the State and the Defendant, that theses proceedings conclude, that there be a finality sooner than later, in what has occurred.

Id. at 21-22.

The Court then asked the parties if they would agree to go forward with 11 jurors. Defense counsel indicated he was "inclined" to go ahead with 11, and that Officer Gorwell had indicated he would agree to go with 11. Id. at 23. The Court, before hearing the State's response to the request, stated the following:

> THE COURT: Mr. Doory, before I hear your answer, I want to impress upon the State the Court's belief, in view of the fact that the Defendant is willing to go forward, subject to that voir dire process, that this trial proceed. Witnesses were brought in from out of town. People came in and testified and, as I have mentioned, time, effort, and a great deal of resources were spent on this trial.
>
> There are eleven people left. They are black and white. They are male and female. They must come forth with the unanimous verdict. It's not a majority rule verdict in this country. The Court strongly believes and has confidence that the eleven jurors that remain can deliberate, and hopefully, come to a unanimous verdict one way or the other.

Id. at 23-24.

The Court gave the State's Attorney a recess and asked him to talk with others in his office and to return with a response. Upon return, the prosecutor stated that the State would not agree to the jury of 11 remaining people because it was concerned about the time delay between the conclusion of evidence and the proposed resumption of deliberations. Id. at 24. In addition, the State's Attorney expressed concern about the "public acceptance of a verdict in this case" given the fact that one of the jurors had to be removed. Id. at 25.

The Court then suggested that the remaining 11 jurors be voir dired to address the State's concern. The State rejected the offer and indicated it would not consent to a jury of 11. At that time, to the surprise of the Court, defense counsel, without consultation with his client, suggested one option would be for this Court to decide the case, without a jury. The State's Attorney took no position on the request. However, in view of the belated request for a bench trial[6] and voicing concern about the public's confidence in one individual rendering a verdict after all that had happened, this Court declined to accept that option. Id. at 28. The Court then stated its dismay with the State's decision and concluded that because the State refused to agree to an 11-person jury, there was no option but to declare a mistrial. Once again the Court said, "[B]ut other than expressing as strongly as the Court can, its disappointment with the State's decision not to agree to go forward with these 11 people of the community so that they could render a unanimous verdict, the Court has no choice but to declare a mistrial, which is now declared. It is a waste and it was unnecessary." Id. at 30.

DISCUSSION

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[6]See Md. Code Cts. & Jud. Proc. Art., § 8-305 (1989 Repl. Vol.); Md. Rule 4-246 (b).

General Principles

The Double Jeopardy Clause of the Fifth Amendment protects a defendant in a criminal proceeding from repeated prosecutions for the same offense.[7] The Double Jeopardy Clause of the Fifth Amendment was held to be applicable to the State through the Fourteenth Amendment in Benton v. Maryland, 395 U.S. 784 (1969). The relevant Supreme Court cases governing the application of the Double Jeopardy clause to a retrial following the declaration of a mistrial have been comprehensively discussed by our appellate courts. See, e.g., State v. Crutchfield, 318 Md. 200 (1989); In Re Mark R., 294 Md. 244 (1982); Cornish v. State, 272 Md. 312 (1974); Fields v. State, 96 Md. App. 722 (1993); McCorkle v. State, 95 Md. App. 31 (1993). These cases recognize that there are two wholly different situations leading to the declaration of a mistrial and that those situations, in the double jeopardy context, are governed by different legal standards. The first situation is when, as in this case, the defendant has objected to the declaration of a mistrial and at the prosecutor's request or sua sponte, the court has declared a mistrial. The seminal Supreme Court decision in this regard is United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824). There, the court held that the Fifth Amendment did not preclude a retrial where the mistrial was declared because of a jury's inability to reach a verdict. The basic principles for determining the permissibility of a retrial following a mistrial were set forth by Mr. Justice Story who ruled that a new trial may be held, without violation of the Double Jeopardy Clause, only if there was a "manifest necessity

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[7]The Fifth Amendment to the Constitution of the United States, reads in pertinent part, as follows: "[No person] shall . . . be subject for the same offense to be twice put in jeopardy of life or limb.

for the [mistrial], or the ends of public justice would otherwise be defeated." 22 U.S. (9 Wheat.) at 580. See also Richardson v. United States, 468 U.S. 317, 323-34 (1984); Oregon v. Kennedy, 456 U.S. 667, 672 (1982); Arizona v. Washington, 434 U.S. 497, 505-06 (1978); Illinois v. Somerville, 410 U.S. 458, 461-62 (1973).

The second type of situation, not relevant here, is when the original trial ends with the defendant either requesting or consenting to a mistrial. In this context, the Double Jeopardy Clause does not bar a new trial unless the prosecutor has intentionally subverted the constitutional protections afforded to a defendant. Oregon v. Kennedy, 456 U.S. 667, 676 (1982). Thus, when a defendant has either consented to or requested a mistrial, the defendant may invoke the bar of double jeopardy only in "those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial." Id. at 679. See also Booth v. State, 301 Md. 1, 5 (1984).

The reasons for precluding a second trial where the defendant's first trial was terminated by a mistrial without his consent were summarized by the Supreme Court in Arizona v. Washington as follows:

> Because jeopardy attaches before the judgment becomes final, the constitutional protection. . . also embraces the defendant's "valued right to have his trial completed by a particular tribunal." The reasons why this "valued right" merits constitutional protection are worthy of repetition. Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be

> convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.

434 U.S. at 503-505.[8] This language was repeated by our Court of Appeals in In Re Mark R., 294 Md. at 249. Its rationale has also been set forth in Gilbert & Moylan, Maryland Criminal Law, § 37.7 (1983).

There are no "hard and fast rules for determining when manifest necessity exists." State v. Cruthfield, 318 Md. at 208. The "manifest necessity" standard is not one that can be applied mechanically or without attention to the particular facts and circumstances confronting a trial judge. U.S. v. Jorn, 400 U.S. 470, 480 (1971); In Re Mark R., 294 Md. at 250. Both the Crutchfield and Cornish decisions discussed the factors applicable in determining whether there was manifest necessity for a mistrial. At one extreme are situations where there is a reasonable alternative to the declaration of a mistrial but the State has acted in a manner which prevents the adoption of that alternative, thereby giving the State an unfair advantage over the defendant. In this context, there would be no manifest necessity for a mistrial. See, e.g., Arizona v. Washington, 434 U.S. at 507-08; In Re Mark R., 294 Md. at 250-251.

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[8]These concepts were also relied on by Mr. Justice Black in Green v. United States, 355 U.S. 184, 187-88 (1957) as precluding "the State with all its resources and power" from making "repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity,. . . . "

At the other extreme is the hung jury which is considered the classic example of manifest necessity. See Crutchfield, 318 Md. at 209; Cornish, 272 Md. at 318. It is clear, however, that manifest necessity does not exist "where the mistrial is declared so as to afford the prosecution a more favorable opportunity to convict. . . . " Downum v. United States, 372 U.S. 734, 736 (1963); Crutchfield, 318 Md. at 210. Moreover, it is the prosecutor who "must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one. The prosecutor must demonstrate 'manifest necessity' for any mistrial declared over the objection of the defendant." Arizona v. Washington, 434 U.S. at 506; In Re Mark R., 294 Md. at 250. Further, the court should "resolve any doubt" in favor of the defendant. Downum v. United States, 372 U.S. at 738.

Case at Bar

In this case, the State contends that the ultimate reason for mistrial was that Juror No. 2 refused to continue as a juror after deliberations had begun. See State's Resp. at p. 5. It is true that the juror's failure to return to deliberations, and this Court's subsequent conclusion that he was unfit to continue jury duty, was the precipitating factor preventing the jury from continuing with 12 individuals. The reasons for the disqualification of Juror No. 2 have been fully set forth above. Courts have regularly permitted a retrial when a mistrial is caused by the discovery of a juror's possible bias or where something occurred to render "doubtful" a juror's impartiality. Cornish, 272 Md. at 319; Thompson v. United States, 155 U.S. 271, 274 (1894). However, as this Court emphasized to the State, Md. Rule 4-311 (b) permits the jury to continue its deliberation as a body of 11.

"[A] retrial is barred by the Fifth Amendment where reasonable alternatives to a mistrial. . . are feasible and could

cure the problem." Cornish, 272 Md. at 320; see also Crutchfield, 318 Md. at 213. Proceeding to verdict with a jury of 11 was a reasonable alternative to a mistrial. The 11 people who remained were representative of the community in both their race and gender. Moreover, pains had been taken to protect them from publicity and to ensure their deliberations were not tainted in any manner by the absence of Juror No. 2. It is the State's posture, however, that Md. Rule 4-311 (b) gives it the absolute right to decline a jury of less than 12, regardless of double jeopardy considerations and only if this Court finds "bad faith" in its decision or Md. Rule 4-311 (b) unconstitutional may the application of double jeopardy bar retrial. This Court disagrees.

Manifest Necessity

First, the cases cited by the State, Oregon v. Kennedy, 456 U.S. 667 (1982) and Booth v. State, 301 Md. 1 (1984) were discussions of the well-recognized exception to the general rule that a retrial is not normally barred by the prohibition against double jeopardy where a defendant seeks or consents to the mistrial. That exception occurs when there is judicial or prosecutorial "over-reaching." See Tabbs v. State, 43 Md. App. 20, 25 (1979). In this case, the Defendant did not seek or consent to the mistrial. Thus, the appropriate issue is whether there was manifest necessity for the declaration of a mistrial, or, as stated above, whether there was a reasonable alternative to the declaration of a mistrial. The test is not whether the prosecutor acted in bad faith. For instance, in Downum v. United States, 372 U.S. 734 (1963), the prosecutor had requested that the jury be discharged because his key witnesses were not present. His motion was granted over the defendant's objection, and two days later the case was started again, a second jury impanelled, and the defendant tried and convicted. On these facts, the Supreme Court held the

defendant had been subjected to double jeopardy and the convictions were reversed. The majority opinion stated that discretion to discharge a jury before verdict should be exercised "only in very extraordinary and striking circumstances." 372 U.S. at 736. In particular, the Court found the prosecutor was responsible because the witnesses' unavailability had been known before the jury was impanelled. Significantly, there was no finding of bad faith on the part of the prosecutor. Rather, the court stated, "We resolve any doubt in favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion." 372 U.S. at 738, quoting United States v. Watson, 28 Fed. Cas. 499, 501 (S.D.N.Y. 1868). Indeed, the dissent recognized both the apparent good faith and diligence of the prosecutor. Id. at 743. Also, the court had the alternative of continuing the trial on the remaining counts.

The Supreme Court reaffirmed Downum in United States v. Jorn, 400 U.S. 470 (1971), and stressed that the Double Jeopardy Clause protects a defendant from the strain and insecurity of retrial even when oppressive government tactics are absent. [I]ndependent of the threat of bad faith conduct by judge or prosecutor, the defendant has a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial." Id. at 485. Jorn was a case where a court, without considering alternative remedies, sue sponte dismissed a jury after the government had called a witness the judge believed had not been adequately informed of his constitutional rights. Thus, in both Downum and Jorn, the court upheld double jeopardy claims in absence of actual or potential harassment or bad faith by the prosecutor of the defendant and, indeed, in the absence of any identifiable prejudice to the defendant.

In contrast, manifest necessity was found in Illinois v. Somerville, 410 U.S. 458 (1973). There, the trial court had declared a mistrial over the defendant's objection when it was disclosed, after a jury was sworn in but before any evidence was presented, that an indictment contained a defect that under Illinois law could not cured by amendment. The result was that on appeal, its defect could be asserted to overturn any judgment of conviction. In that opinion, Justice Rehnquist held that the mistrial met the "manifest necessity" requirement since the trial court could reasonably have concluded that the "ends of public justice" would be defeated by having permitted the trial to continue. Somerville is distinguishable from the current case in that although the jury had been impanelled and sworn, the prosecuting attorney realized the fatal deficiency in the indictment before any evidence had been presented. In addition, unlike Md. Rule 4-311 (b), there was no alternative because the defect could not be cured. At the same time, the Somerville opinion recognized that the declaration of a mistrial "on the basis of a rule. . . that would lend itself to prosecutorial manipulation would involve an entirely different question. . . . " 410 U.S. at 464.

In this case, this Court concludes there was both prosecutorial manipulation and a reasonable alternative. The case this Court has found most on point is Hutchens v. District Court, 423 P. 2d 474 (Okla. Cr. 1967). There, the appellate court, on facts similar to these, held there was no "cogent or compelling reason" for a prosecutor to refuse to go forward with a jury of 11 members. It observed the prosecutor's refusal " has the appearance of being an arbitrary or adamant position, not based upon any necessity whatsoever. . . Insofar as a unanimous verdict is required to sustain a conviction, it would appear that the State's chances of obtaining such a unanimous conviction with an 11-man jury would be enhanced." 423 P. 2d

at 478. The Court makes a finding of fact that the State's refusal to go forward with less than a broad-based jury of 12 individuals at the conclusion of a long and expensive trial manifested a deliberate intent on its part to afford itself a more favorable opportunity to convict. The court also finds that a jury of less than 12 was a reasonable alternative, and that the State has not met its burden of proving otherwise. Under those circumstances, manifest necessity does not exist. Crutchfield, 318 Md. at 210.

Md. Rule 4-311 (b)

The State contends that only if this Court finds Md. Rule 4-311 (b) unconstitutional, may the principles of double jeopardy bar retrial of the Defendant. The issue, however, is not the constitutionality of the rule. Rather, the question is whether the State's right to consent to a jury of less than 12 members under Md. Rule 4-311 (b) outweighs the Defendant's right not to be placed twice in jeopardy under the Fifth Amendment of the United States Constitution. To begin with, it is far from clear that the State has a State constitutional or common law right to insist on a jury of 12 persons if the defendant is willing to be tried by a lesser number. In Maryland, the right to a jury trial is found in Articles 5 and 21 of the Maryland Declaration of Rights.[9] Under Maryland law, a

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[9]Article 5 provides in pertinent part "That the Inhabitants of Maryland are entitled to the Common Law of England and the trial by Jury, according to the course of that Law. . . ."

Article 21 provides "That in all criminal prosecutions,

defendant may waive the right to trial by jury before the commencement of the trial. Md. Code Ann. Cts. & Jud. Proc. Art., §8-305 (1989 Repl. Vol.); Md. Rule 4-246 (b). If the Court finds that the waiver is made knowingly and voluntarily and thus accepts it, the State does not have the right to elect trial by jury. Md. Rule 4-246 (a). Since colonial times, Maryland has freely permitted waiver of jury trial in criminal cases. Bond, "The Maryland Practice of Trying Criminal Cases by Judges Alone, Without Juries," 11 A.B.A.J. 699 700-701 (1925). Indeed, historically agreement of both parties has not been required for a criminal trial without jury. Id. Of significance, "[t]he accused alone, by his election" could compel trial without jury. Bond at 701.

In addition, not only has Maryland from its early history permitted waiver of jury trials, by 1776, it had long since departed from the English Common Law in permitting waiver of the 12-person jury. State v. Kenney, 327 Md. 354, 360 (1992). Kenney held there is no "imperative requirement of a 12-person jury which cannot be waived" under the Maryland Declaration of Rights. Id. at 359. Likewise, the Supreme Court in Williams v. Florida, 399 U.S. 78, 102 (1970) found, "The fact that the jury at common law was composed of precisely 12 is a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance except to mystics." Under the precedent set by Williams, there is no federal constitutional right to a 12-person jury. Id. In sum, under the Maryland Declaration of Rights, a defendant has a right to trial by jury in criminal cases, but it is a right that may be waived, and that waiver is not conditional upon the consent of the State. Moreover, as discussed in Kenney and Williams

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every man hath a right. . . to a speedy trial by an impartial jury, ..."

under both the State and federal constitutions, a 12-person jury appears to be a "historic accident."

What is important, however, is regardless of whether the State's right under Maryland Rule 4-311 (b) has its roots in the State constitution, common law, or the Maryland court rules, the State's exercise of that right cannot deprive a defendant of his or her double jeopardy protections under the Fifth Amendment.[10] The Supremacy Clause of the United States Constitution, Art. VI., must always be borne in mind.

> This Constitution. . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.

It must also be recalled that a defendant's right to trial by jury in criminal cases is specifically designed "to prevent oppression by the Government." Duncan v. Louisiana, 391 U.S. 145, 155 (1968). The State's interest in the context of double jeopardy is to "serve the ends of public justice." Illinois v. Somerville, 410 U.S. at 464. That interest is satisfied as long as the number of the jury is "large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community." Williams, 399 U.S. at 100. The State's interest was certainly met in this case with the remaining 11 individuals

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[10]Similarly, although there is no constitutional basis for the granting of peremptory challenges, neither the State nor a defendant may exercise peremptory challenges in a discriminatory manner. Georgia v. McCollum, ___ U.S. ___, 112 S.Ct. 2348 (1992); Batson v. Kentucky, 476 U.S. 79 (1986); State v. Gorman, 324 Md. 124 (1991); Gilchrist v. State, 97 Md. App. 55 (1993).

on the jury.

When it is the State that objects to an 11-person jury, at least one commentator has observed that a rule such as Md. Rule 4-311(b) granting a prosecutor broad power to foreclose the alternative of a reduced panel "invites manipulation and harassment, and exposes defendants to the potentially severe burden of a second, long trial, regardless of whether the government's interest of a complete jury of 12 is a substantial one in the particular case." See S. Schulhofer, "Jeopardy and Mistrials," 125 U. of Pa.L.Rev. 499, 524-27 (1977).[11] As explained in this article, the prosecutor's interest in seeing that cases are tried before a tribunal which is fair and impartial is certainly met if a panel is reduced from 12 to 11, as it remains "sufficiently large to provide solemnity and force to its verdict." Id. at 526. The article concludes

> Prosecution objections to an eleven member jury, therefore, seldom will have a legitimate basis, and in most instances this alternative

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[11]This law review article is the only one this Court has found discussing the issue of the 11-member jury and double jeopardy. In particular, the article discusses the problem in regard to Fed. R. Crim. P. 23(b) when it was similar to Md. Rule 4-311(b) and before it was amended in 1983. In that context, the author observed that in order to construct the federal rule as "consonant" with double jeopardy principles, an interpretation might require that when necessary to avoid mistrial, a prosecutor's stipulation to a panel of less than 12 may not be unreasonably withheld. The 1983 amendment permits a court, if it "finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict," to permit the remaining 11 jurors to continue deliberations to reach a valid verdict.

> should not be rejected even under the more flexible standard for passing upon mistrial... Normally, ...the prosecution should not be able to force a mistrial by refusing to accept an 11-member jury.

Moreover, the fact that this trial was at its final stages mitigates against the State's indiscriminate exercise of its right under Md. Rule 4-311(b). In Illinois v. Somerville, the court granted a mistrial after the jury had been impaneled and sworn, but before any evidence was taken. At this early stage of a trial, a defendant's interest in avoiding reprosecution can be considered "weak" and the danger of reprosecution manipulation to gain a tactical advantage in a retrial is minimal. Schulhofer, at 507. But once, as in this situation, evidence has been taken, strategies of cross-examination revealed, and weaknesses in a case uncovered, "stringent safeguards" are appropriate if the difficult continuing a trial is caused by the prosecutor. Id. at 509.

> Even when the first trial has produced no specific tactical setback to the prosecution and even when there is no conceivable possibility of governmental bad faith, either in the prosecutor's triggering of the mistrial situation or in the judge's selecting among alternatives for resoling it, the declaration of mistrial will sharply increase the overall burden of defending the case and tend to increase the prospects for conviction in ways often difficult or impossible to demonstrate.

Id. at p. 511.

Therefore, if the State invokes its right to refuse a jury with less than 12 under the rule before a trial or at an early state, before testimony and strategies are uncovered, double jeopardy

interests will be weak. Likewise, if the State exercises its right of "veto" because of legitimate concerns over the size or representativeness of a jury, its right under Md. Rule 4-311(b) may outweigh any double jeopardy interests. The constitutionality of the rule is not at issue. It is only when the State's consent under the rule is intentionally withheld under circumstances that will unquestionably impair the command of the Double Jeopardy Clause that the State's right under the rule must yield.

A Reasonable Alternative

Finally, and most importantly, there was a reasonable alternative to the mistrial.[8] It must be emphasized that the State's reason for not giving consent to a 11-member jury was expressed concern about the public acceptance of the verdict. There was no basis for that concern. Extensive questioning of Juror No. 2 had revealed that his alleged assault had absolutely nothing to do with the players in this trial, and there is not even a hint that it was racially motivated.

The State's imposition of race into its decision with its

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[8]This case is therefore distinguished from the situation in Reemsnyder v. State, 46 Md. App. 249, 257 (19880) where the Defendant's refusal to proceed to verdict with 11 jurors resulted in "manifest necessity" of the mistrial. See Also Gilbert & Moyland, Maryland Criminal Law, §37.7 (1983) at p. 447, which states:

> The animating principle clearly is that since we are protecting the right of a defendant to have the tribunal held together until a verdict is reached, all alternatives less drastic than the declaration of a mistrial should be considered before the more drastic step is taken. Consideration at least should be given to such alternatives as a jury of less than twelve....

stance that "certain segments" of the community could not have accepted the verdict because Juror No. 2 was allegedly assaulted by white teenagers is an affront to the diverse population that makes up our community. As the Court stated to the prosecutor:

> Everybody here is quite sensitive to the issue of race if that is an issue to go into this case. Merely because three teenagers who happen to rob a black person are white, I don't believe should be sufficient for the State's Attorney to believe that somehow the public can have an inference that that had a connection with white people nebulously involved in the case. I do believe it insults the intelligence, integrity, and concern and justice of the general community.

Tr., Aug. 9, at 44

This was so, of course, because as the State conceded, there is no evidence the assault incident was in any way connected with the case. In contending the public would not accept a verdict from the 11 remaining people, the State ignores the emotional and economic strain already placed on the Baltimore City community by the trial, replete with huge daily media coverage. Certainly, it was in the community's interest to bring a finality to these proceedings.

Moreover, there is no basis for the State's posture that there was too much of a delay between the conclusion of evidence and the resumption of deliberations on August 9th. It was the State's Attorney who suggested on Friday, August 6th, that the decision as to whether to proceed with 11 jurors be postponed until Monday when if it were determined the missing juror's absence had nothing to do with the case, "proceeding with eleven [jurors] would be acceptable." Tr., Aug. 6, at 21.

Also, while it is true the presentation of evidence had concluded on Tuesday evening, closing arguments had taken place on Thursday, and the jury had deliberated over five hours that day. In fact, by resuming on Monday, only one day of deliberations was lost.

CONCLUSION

In sum, the State has set forth no justification for depriving this Defendant of his "valued right to have his trial completed by a particular tribunal," which goes to the very heart of the protection afforded by the Double Jeopardy Clause. United States v. Jorn, 400 U.S. at 484, quoting Wade v. Hunter, 336 U.S. 684, 689 (1949). An unarmed African-American teenager is dead, killed by the bullet of a white Baltimore City police officer. The victim's only offense was the apparent joy ride he took in a stolen car. The loss of his life is a tragedy to his unfulfilled potential and the grieving family who survive him. However, the Defendant in this case, like all those charged with crimes under the American legal system, is entitled to a fair trial. It is important for the State to prosecute vigorously those individuals charged with crimes. It is equally important that the State deals fairly with those it prosecutes. It is with these considerations in mind, the Court concludes that the State has failed to meet its "heavy burden" of demonstrating there was manifest necessity for this mistrial.

ORDER

For all of the aforegoing reasons, it is this 19 day of November, 1993, HEREBY ORDERED that this case be DISMISSED.

Judge Ellen M. Heller
Ellen M. Heller, Judge

cc: Timothy J. Doory, Assistant State's Attorney
Henry L. Belsky, Esquire

STATE OF MARYLAND,	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
EDWARD T. GORWELL, II	*	BALTIMORE CITY
Defendant	*	CASE NO. 193118001

* * * * * * * * *

ORDER

It is this 21 day of August, 1995, hereby:

ORDERED, that the Defendant's Motion to Stay the State's Jurisdiction over this matter be granted until a final disposition is reached by the Supreme Court of the United States.

JUDGE ELLEN M. HELLER
JUDGE